

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE  
AUGUST SESSION, 1996

**FILED**  
October 8, 1996  
Cecil W. Crosson  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 )  
 )  
 VS. )  
 )  
 TONY WAYNE MCELHINEY, )  
 )  
 Appellant. )

C.C.A. NO. 01001-9501-CC-096  
CHEATHAM COUNTY  
HON. ALLEN W. WALLACE  
JUDGE  
(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF CHEATHAM COUNTY

FOR THE APPELLANT:

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Upon his plea of nolo contendere, the Defendant was convicted of four counts of aggravated sexual battery. The trial judge sentenced him to four concurrent twelve-year sentences to be served in the Tennessee Department of Correction. On appeal, the Defendant argues that his sentences are excessive. We affirm the judgment of the trial court.

The indictment in this case charged the Defendant with twenty separate counts of aggravated rape of a seven-year-old victim during a ten-month time frame. The Defendant was about thirty years old at the time the offenses occurred. The victim was the daughter of the Defendant's girlfriend.

The Defendant entered into a plea agreement which allowed him to enter a plea of nolo contendere to four counts of aggravated sexual battery. Sentencing was left to the discretion of the trial judge. After conducting a sentencing hearing, the trial judge sentenced the Defendant as a Range I standard offender to the maximum sentence of twelve years for each conviction, said sentences to be served concurrently. It is from the sentence imposed by the trial judge that the Defendant appeals.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct.

Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The presentence report reflects that the Defendant was approximately thirty years old and that his formal education ended with the ninth grade. He has no significant history of criminal convictions, although he does have a long history of marijuana use. He apparently has been regularly employed as a laborer, roofer, and welder.

A child abuse investigator employed by the Department of Human Services testified that the Defendant admitted that he had sexually abused the victim more than twenty times. She specifically referred to one incident in which the Defendant stated that he got the victim in his car and “that he had pulled [the victim’s] panties down, placed his penis between her legs and ejaculated, kissed her on her vagina and told her to go play.” She stated that the victim was receiving psychological counseling and has had some behavior and psychological problems from “post-traumatic disorder.”

The Defendant’s mother testified that her son had a good work record and that she needed him to help her take care of her husband, who has multiple sclerosis.

In considering the enhancement factors applicable to the Defendant’s sentence, the trial court made no specific reference to the statutory enhancement factors codified at Tennessee Code Annotated section 40-35-114. In discussing the enhancement factors, the trial court found that the victim suffered “serious bodily injury.” The trial court further observed that sentencing the Defendant to the minimum would “deprecate [sic] the seriousness of the offense.” He also noted that there was a need for deterrence, and “that in itself would require more than the minimum sentence.” Finally, the trial court noted “the number of times that this happened in this case, the court has to consider.” After making these observations, the trial court sentenced the Defendant to the maximum of twelve years on each count.

The Criminal Sentencing Reform Act of 1989 provides that the record of the sentencing hearing must include specific findings of fact upon which application of the sentencing principles was based. Tenn. Code Ann. § 40-35-209(c). The purposes of the sentencing laws and certain sentencing considerations are set forth in the statutes. See Tenn. Code Ann. § 40-35-102 and § 40-35-103. When the trial court imposes a sentence, it is required by statute to place on the record either orally or in writing what enhancement or mitigating factors it found, if any. Tenn. Code Ann. § 40-35-210(f).

In the case sub judice, although the trial judge did discuss on the record the circumstances which he believed should enhance the Defendant's sentence, he did not identify which of the statutory enhancement factors he determined were applicable. Because the trial judge did not make the required findings of fact and because the record does not demonstrate that the trial court considered the applicable sentencing laws and principles, our review of the sentence will be de novo without a presumption that the determinations made by the trial court are correct.

We first address the enhancement factors which we believe are supported by the record. The Defendant was sentenced as a Range I standard offender and he does have a previous history of criminal behavior. Tenn. Code Ann. § 40-35-114(1). This is evidenced by the Defendant's admitted long history of marijuana use. We believe that the multiplicity of the counts in the indictment and the fact that the Defendant admitted to the Department of Human Services investigator that he had sexually abused the victim more than twenty times also support the existence of this enhancement factor. See State v. Cummings, 868

S.W.2d 661, 667 (Tenn. Crim. App. 1992). In addition, the record supports a finding that the Defendant abused a position of private trust. Tenn. Code Ann. § 40-35-114(15). The victim was the daughter of the Defendant's girlfriend, and both his girlfriend and the victim had apparently resided with the Defendant for some period of time.

We note that the trial court referred to the "serious bodily injury" suffered by the victim in discussing the enhancement factors. We readily acknowledge that all child victims of sexual abuse suffer serious injuries as a result of the perpetrator's crimes. This is one of the reasons that the legislature has classified the offense of aggravated sexual battery as a Class B felony. Therefore, in order for the Defendant's sentence to be further enhanced within the Class B felony range based on the personal injuries inflicted upon the victim, there must be proof that the injuries inflicted upon this victim were "particularly great" in relation to the injuries suffered by other child victims of aggravated sexual battery. No evidence of the injuries being "particularly great" was introduced at the sentencing hearing in the case sub judice.

In considering enhancement factors, the trial court made reference to the need to avoid depreciating the seriousness of the Defendant's offense and the need to provide effective deterrence to others likely to commit similar offenses. These are valid statutory considerations to guide the court in determining whether a sentence should be served in confinement rather than on some form of release in the community. Tenn. Code Ann. § 40-35-103. However, these factors have already been considered by the legislature in setting the appropriate range for the

offense and thus are not appropriate considerations to enhance the length of the sentence within the range.

The trial judge found that no mitigating factors were established by the Defendant, and we agree that the record does not support the application of mitigating factors. Tenn. Code Ann. § 40-35-113.

We also note that at the conclusion of the sentencing hearing, the State argued that the trial judge should consider ordering one or more of the Defendant's sentences to be served consecutively. In summarily rejecting the State's argument and request concerning consecutive sentencing, the trial judge did not discuss the possible applicability of Tennessee Code Annotated section 40-35-115(b)(5). The trial judge simply stated that he did not believe this was a case for consecutive sentencing.

From our review of the entire record in this case, we believe that the twelve year sentences ordered by the trial court are reasonable and appropriate. Accordingly, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOSEPH M. TIPTON, JUDGE